Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Preemption of State and Local Zoning and	)	FCC No. 97-296
Land Use Restrictions on the Siting,	)	MM Docket No. 97-182
Placement and Construction of Broadcast	)	
Station Transmission Facilities	)	

COMMENTS OF ORANGE COUNTY, FLORIDA

Below are the Comments of Orange County, Florida, in response to the above-referenced item. Specifically, reference will be made to the paragraph number contained in Section IV of FCC Notice of Proposed Rulemaking No. 97-296. The issue as listed by the FCC will be paraphrased and the Orange County comment will follow.

1. Paragraph 18. FCC seeks comment on the Proposed preemption rule as set forth in FCC No. 97-296 Appendix B.

Orange County Comment: First, a general, but important, observation must be made. While the tone of the proposed rule leads one to believe that the thrust of the preemption is directed towards local government zoning actions, the actual language states:

> A state or local government . . . shall act on any request for authorization to place, construct or modify broadcast transmission facilities within a reasonable period . . .

As written, the rule language is ambiguous. The phrase "authorization to place, construct or modify broadcast transmission facilities" covers not only zoning requests, but building permits as well. Clarification is necessary to be explicit that the FCC is not attempting to preempt building code requirements applicable to DTV towers. Further, it must be clarified that the short

time frames proposed in the rule are applicable only to local government zoning approval not building permit reviews. Carrying this thought to its conclusion, it must be clarified that failure of a local government to fully act on a building permit within the time frames will not "result in the request [for a building permit] being deemed granted."

Also imperative is clarification that the review times will begin to run when a complete and appropriate application is submitted to a local government. An applicant should not be allowed to benefit from submission of inadequate or incomplete information and then claim approval because the established time frame has run and the local government did not receive the appropriate information needed to conduct its review.

2. Paragraph 19. FCC seeks information on siting procedures and time frames involved therewith.

Orange County Comment:

A. *Synopsis of Orange County, Florida, Regulations.* In regards to time frames, in Orange County, Florida, a communication tower over 300 feet in height requires a special exception. Attached as Attachment A is a memorandum dated October 6, 1997, from Mitch Gordon, Chief of Operations, Orange County Zoning Department, which discusses those applicable time frames. As to siting procedures, in the Orange County Code, Section 38-1, the definition of a communication tower does not include a structure which exceeds 300 feet in height. It is Orange County's understanding that most broadcast towers exceed 300 feet in height. Orange County Code Section 38-1427, entitled "Communication Towers," at subsection (b)(2), pertaining to applicability, states:

Those facilities which would be considered communications towers

> but for the fact that they are in excess of three hundred (300) feet shall be required to obtain a special exception and comply with the setback, separation distances from other uses, separation distances from other communication towers and notice requirements as set forth in subsections (d)(1), (d)(2), (d)(3), and (d)(8), respectively. For purposes of implementing subsection (d)(2)d to towers in excess of three hundred (300) feet in height the separation distance required is limited to a maximum of fifteen hundred (1500) feet.

Subsection (d) is entitled "performance standards." Subsection (d)(1) generally requires communication towers to meet the standard setback requirements of the district in which they are located. Subsection (d)(2) pertains to the required separation between the tower and residential uses. As stated above, regardless of the tower height, the maximum separation is 1500 feet.

Subsection (d)(3) pertains to separation between communication towers. Pursuant to subsection (d)(3)a the most extreme separation is from a lattice or guyed tower to another lattice or guyed tower at 5000 feet; from a lattice or guyed tower to a monopole between 80 and 170 feet the separation is 2500 feet; from a lattice or guyed tower to a monopole below 80 feet the separation is 500 feet. The tower to tower separation is not applicable (i.e. suspended) where both towers are located in either industrial or heavy commercial zoning districts. Subsection (d)(3)c recognizes the creation of "Broadcast Areas" to accommodate tall towers in excess of 300 feet. In actuality, the needs of the DTV broadcast industry are expected to be fully accommodated within the boundaries of these Broadcast Areas. In pertinent part, subsection (d)(3)c states:

> The separation distances between communication towers as set forth in subsection (d)(3)a shall not be applicable to those communication towers located within the following designated "Broadcast Areas" in which tall (i.e., in excess of three hundred (300) feet) television towers presently exist and within which it is deemed appropriate and desirable for future communications towers to locate:

1. [legal description containing approximately 165 acres]

2. [legal description containing approximately 46 acres]

3. [legal description exceeding 40 acres]

> The proximity of other existing communications towers shall be a factor considered and addressed during the special exception hearing for any proposed communication tower located within the boundaries of a designated broadcast area. Those communications towers located within a broadcast area shall be considered existing towers for purposes of distance separation measurement by proposed towers located outside the above-designated broadcast areas.

Subsection (d)(8) requires that, prior to the public hearing, notice of the special exception be sent to all property owners within 500 feet of the perimeter of the parent parcel that is requesting the special exception for the communication tower.

B. *Effect of Orange County Regulations on local broadcast towers.* In general, it is believed the local broadcast industry does not anticipate any problem with the existing permitting procedural time line (about 18 weeks) and regulations. See Attachment 2.

3. Paragraph 20. FCC seeks comment on whether existing ordinances will impede adherence to the accelerated DTV build-out schedule.

Orange County Comment: As noted in comment 2 above, new tall towers in Broadcast Areas will require special exceptions which typically take 18 weeks from initial special exception application submittal to the actual start of tower construction.

Replacement towers to accommodate co-location are addressed in Orange County Code Section 38-1427(h). Subsection (h)(3)a allows an additional 40 feet of height by right to accommodate co-location. Subsection (h)(4) allows the replacement tower to be moved onsite 75 feet by right. Provided the tower to residential separation is maintained, the replacement tower may

be moved within 250 feet of its existing location. These relocations of existing towers would *not* require zoning special exception approvals, only building permits. If the replacement tower desires to move more than 250 feet from its existing location, then it will be treated as a new tower and will be required to go through the applicable process which may include a special exception hearing.

Provided a replacement tower is built within the allowable parameters, no extraordinary zoning approval is necessary and the existing Orange County Communication Tower regulations will not impede adherence to the accelerated DTV build-out schedule.

4. Para. 21. FCC seeks comment on scope of preemption proposed by Petitioners as set forth in 97-296 Appendix B.

Orange County Comment:

Generally, Orange County does not believe that preemption of local government zoning power is warranted. More particularly, Orange County will provide comment to each portion of the Petitioners' Proposed Preemption Rule as included in Appendix B:

- *Subsection (a); Siting Procedures.* As mentioned above in the County's comment to paragraph 18, clarification is necessary to explicitly state that this subsection pertaining to siting procedures is applicable only to zoning and land use matters which are distinct from building permits and building codes which should not be regulated by this subsection.

- *Subsection (a)(1), Modification of existing towers with no change in location.* In Orange County, this process would be covered by a building permit only. No zoning or land use approvals would be necessary. Building permit review time frames should be covered under the standard building permit application review process.

- *Subsection (a)(2)(I), Relocation of a tower to within 300 feet of present tower;*

(ii) Reconstruction to accommodate co-location; or (iii) Increase height of existing tower. These provisions are similar to the adopted Orange County regulations. The specifics of the County regulation are set forth in the County comments to paragraph 19 above.

Provided the parameters of the tower modifications are within the standards set forth in the ordinance, then no zoning or land use approval is necessary; only a building permit.

Orange County recommends that consideration be given to rewriting the entire subsection (a) to encompass the concept that provided the criteria set forth in subsection (a)(1) and (a)(2) are met then no separate land use or zoning approval would be necessary. The applicant would still need to apply for and receive a building permit for the tower.

- *Subsection (a)(3), Modification or construction of a tower not meeting the criteria of subsections (a)(1) or (a)(2).* In this circumstance, the tower is truly a new structure and not merely a modification of an existing structure. Therefore, a land use and zoning approval is necessary. As previously mentioned, a tall tower over 300 feet in height requires a special exception. The total processing time from initial application of the special exception to the granting of the building permit, thereby authorizing commencement of construction, is about 18 weeks in Orange County. This time period includes the requisite notice periods prior to the public hearings.

- *Subsection (a), last sentence stating failure of the local government to timely act is deemed approval.* This provision could have harsh ramifications and should be deleted. Typically, if the local government is unwilling to timely act, a writ of mandamus action is available. If this provision is to stay, clarification is necessary to define that the time period begins to run when the applicant has submitted a complete and sufficient application so that the local government may properly evaluate that application.

- *Subsection (b)(1), Preemption based on (i) RF emissions; (ii) interference, and (iii) lighting, painting and marking requirements consistent with FAA requirements.* Orange County has no objection to this limited preemption. The present Orange County Communication Tower Ordinance already generally defers to the federal standards on those issues. See Orange County Code, Section 38-1427(d)(5), (d)(6), and (i).

- *Subsection (b)(2), Preemption applies unless demonstration of overriding health and safety objective and federal interests are served.* As written, this rule applies to "any state or local land use, building or similar law."

Putting the discussion over whether to preempt land use laws aside, building codes *must not* be preempted. In Florida, each local government with building construction regulation responsibilities is mandated to adopt one of several State Minimum Building Codes approved by the state pursuant to Florida Statutes, Section 553.73.

A federal preemption of state imposed minimum building codes is unwise and a recipe for disaster. In hurricane prone states, such as Florida, certain enhanced minimum codes, such as windloading, are necessary. The state legislature has debated the issue extensively to reach a balance between the health and safety requirement warranted by geographic realities and the business interests.

If any type of preemption is necessary as to building code requirements, the federal government should defer to building code requirements imposed by individual state governments that are cognizant of their individual geographic realities.

- *Subsection (c), Requirement that any decision be in writing, supported by competent substantial evidence and delivered in 5 days.* This language appears to be an attempt to

track the language set forth in the Telecommunications Act of 1996 at 47 U.S.C. §332(c)(7)(B)(iii). Title 47 U.S.C. §332(c)(7)(B)(v) sets out that any person adversely affected by a decision of a State or local zoning board can commence an action in any court of competent jurisdiction, be it federal or state court at the option of the party making the appeal. In order to accommodate and enable such judicial review, §332(c)(7)(B)(iii) requires local authorities to create a proper record in order to allow a reviewing court to review the record, and determine if such rationale for the denial is consistent with the requirements of the Telecommunications Act. *Western PCS II,* 957 F. Supp. at 1236; *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F. Supp. 732, 743 (C.D. Ill. 1997). The congressional conference report clarifies this further, by stating "[t]he phrase 'substantial evidence contained in a written record' is the traditional standard used for judicial review of agency actions." H.R. Conf. Rep. No. 104-458, 104th Cong., 2nd Sess. 208 (1996), 1996 U.S.C.C.A.N. 124, 223.

One would think that the application of the language would therefore be simple. However, the standards for "substantial evidence" differ from state to federal courts. Further, the federal courts themselves are presently struggling, in different directions, to interpret this language.

According to *Westel-Milwaukee v. Walworth County*, 556 N.W. 2d 107, 109 (Wis. App. 1996), "the Act requires local authorities to support their decisions with 'substantial evidence' and written findings. 47 U.S.C.A. §332(c)(7)(B)(iii). This provision, however, does not change the methodology that local zoning authorities should apply when making findings because their decisions are already gauged under the 'substantial evidence test." Florida case law provides through *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993), that the zoning board is not required to make findings of fact in making a decision on a landowner's

application to rezone property and *Odham v. Peterson*, 398 So. 2d 875, 877 (Fla. 5th DCA 1981), *approved in part*, 428 So. 2d 241 (Fla. 1983) provides that a decision of a zoning board includes as an "implied finding all factors necessary to that conclusion." Therefore, in Florida, one would assume that the record submitted with the Clerk of the local government, the public records, and the transcript of the public hearing would be sufficient for the court to make a determination that there is substantial written evidence to support the local government's decision on a tower request.

To the contrary, in *AT&T Wireless PCS, Inc. et al. v. City Council of the City of Virginia Beach*, Case No. 2:97cv391, United States District Court for the Eastern District of Virginia, Norfolk Division, the court in its Memorandum and Order at pages 21 and 22 stated:

> At minimum, local authorities must issue ruling in written form, setting out the reasons for the decision and the evidence that led to the decision. *Illinois RSA*, 963 F. Supp. At 743; *Wester PCS II*, 957 F. Supp. At 1236; *see also Sprint v. Jefferson County*, 968 F. Supp. At 1468-69.

The point here is that the application of 47 U.S.C. 332(c)(7)(B)(iii) is in a state of judicial uncertainty and should not be blindly used as a model for the standard applicable to DTV rules.

As to the proposed requirement that such written decisions by local governments be issued within 5 days, 10 days is a more realistic time frame.

- *Subsection (d), Alternative dispute resolution.* While alternative dispute resolution is an attractive alternative, the arbitrator should be an independent entity without allegiance to either special interest groups or the FCC. As presently drafted, this subsection permits the FCC to select the arbitrator in each case. It would be preferable if an approved list of arbitrators was available from which the affected parties could choose.

- *Subsection (e), Declaratory Relief.* This subsection implies that the FCC will

act as an appellate court to review land use decisions effecting broadcast towers made by local governments. Orange County objects to this provision. Appellate review is properly the domain of the courts not an administrative agency.

- *Subsection (f), Definitions.* No comment.

5. Paragraph 22. FCC preemption based on RF emissions and aesthetic purposes.

Orange County Comments: The Orange County Communications Tower Ordinance already defers to the federal standards for RF emissions.

The federal regulation should not preempt local regulation intended for aesthetic purposes.

However, in order to promote the FCC agenda of timely conversion to DTV, the switch out and co-location of existing towers could be permitted by right without further zoning approval if such work was conducted within defined parameters. The Orange County Communication Tower Ordinance already provides for this. Brand new towers and towers not meeting the defined parameters should require zoning approval, including a special exception hearing, so that the public and the citizenry most directly by the aesthetic impact of a new tower will have a forum in which to air their views.

6. Paragraph 23. Review Time Frames.

Orange County Comments. The review time frames provided in Appendix B are too short. Local government in carrying out its zoning function must adhere to due process and notice requirements. In Orange County, the time necessary for processing, review, notice, and public hearings attributable to a zoning application and then the subsequent submittal, review and approval of the building permit is 18 weeks. (See Attachment A.)

Accordingly, Orange County advocates a minimum time frame of 120 days for a definite decision on a broadcast tower application. Relief for the applicant from failure of the local government to act within that time frame should be the traditional remedy of pursuit of a writ of mandamus by the applicant.

Respectively submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and nine (9) true and correct copies of the foregoing has been furnished by Federal Express this 29th day of October, 1997, to the Secretary, Federal Communications Commission, Washington, D.C. 20554 in accordance with Para. 25 of FCC No. 97-296.

Paul H. Chipok
Assistant County Attorney
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cc: Thomas J. Wilkes, Orange County Attorney
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phc/misc/comments.wpd
(10/28/97)

ORANGE COUNTY GOVERNMENT
FLORIDA

October 6, 1997

TO: Paul Chipok, Assistant County Attorney

FR: Mitch Gordon, Chief of Operations, Zoning Department

RE: Communication Towers Scheduling for Public Hearings and Permits

Below is a schedule and timing for communication towers requiring public hearing and building permit approvals and those that simply require building permit approvals:

I. Towers Requiring Public Hearing for Special Exception and/or Variance and Building Permit Approvals

1. A completed application for a variance and/or special exception in accordance with the submission requirements of the communications tower ordinance must be submitted at least 6 weeks prior to Board of Zoning Adjustment (BZA) public hearing date. County staff meets with the applicant approximately 2 weeks prior to the BZA public hearing date to discuss the application. The BZA public hearing dates are the 1st Thursday of each month;

2. BZA conducts a public hearing on tower application on first Thursday of month;

3. Assuming the BZA recommends approval of the application, the request becomes final if no one appeals within 15 calendar days from the BZA recommendation. In addition, on the first or second Tuesday after the BZA recommendation, the Board of County Commissioners (BCC) must confirm the BZA's recommendation;

4. If the BZA recommendation is appealed to the BCC, a public hearing before the BCC must take place within 45 days of the BZA's recommendation;

5. If the BCC approves the tower application, it becomes final after 10 calendar days. After 10 calendar days, the applicant may submit construction plans to Orange County staff;

6. The construction plans are reviewed by County staff and permits are typically issued within 6 weeks from submission date of plans.

The total amount of time the above steps take is 18 weeks.

ZONING DEPARTMENT
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Attachment 1

Towers Requiring Building Permit Approvals Only (Consistent with Zoning Regulations, no public hearing required)

SEE STEP #6 ABOVE. TOTAL TIME IS 6 WEEKS.

ORANGE COUNTY GOVERNMENT FLORIDA

Interoffice Memorandum

October 27, 1997

TO: Paul Chipok, Assistant County Attorney

FROM: Gail Tyree, Development Coordinator, Zoning Department Gail

SUBJECT: DTV (Digital)/HDTV (High Definition) Tower Issue

Subsequent to our meeting 10-10-97 regarding the FCC's proposed rulings on the above subject matter, I spoke with Mr. Oliver Harper, Site Manager, and Mr. Burt Brown, Operations Manager, TowerCom Ltd. (Bithlo Tower Site). TowerCom is one of the companies that provided input on TV/Radio towers during the original Tower Ordinance drafting. TowerCom also provided us with the property legal descriptions for the geographically designated "Broadcast Area" within our Tower Ordinance.

I spoke with both gentlemen about the FCC's timing for tower erection, proposed permitting turn-around period, the industry's needs, and Orange County's current tower ordinance and permit procedures. They provided the following comments:

> The biggest concern of the broadcast industry will be in meeting FCC's tower erection deadline. The problem is in finding adequately-insured, properly-trained erection crews; there is an extreme shortage. Orange County's permitting procedure timeline (approximately four months, which includes going through BZA process plus the building permit process) is insignificant compared to the FCC tower erection deadline and the tower erection safety issue. They feel the FCC proposed 21-45 day turnaround is unrealistic.
>
> There is one plan under way now to erect a new tower at the Bithlo Tower Site. It is proposed at 1,000 feet in height, and its purpose is to accommodate the "big guys" (TV Channels 2, 6, 9, 24, and possibly Cocoa PBS), and four other users, specifically for DTV. Mr. Brown noted the technology is not currently in place for HDTV—it is years away. Mr.

Attachment 2

Brown said a good number of companies will have to be "bumped" off of existing towers, but it's his belief the proposed 1,000 feet tower at Bithlo can accommodate the bulk of them. I explained the need for BZA, how that works, as well as their exemptions, and the construction permitting process. They are aware of the rules and regulations and see no problem with complying with them.

Some of these gentlemen's comments are consistent with the concerns expressed by other industry members in the recent broadcast journals provided me by a customer of mine who is doing some work for Channel 63.

GT/lcb

c: Melvin Pittman, Manager, Zoning Department